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IN THE

Supreme Court of the United States

No. 725

NORTHWESTERN OIL COMPANY,

Petitioner,

vs.

SOCONY-VACUUM OIL COMPANY, INC., ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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IN THE

Supreme Court of the United States

NO.....

NORTHWESTERN OIL COMPANY,

Petitioner,

vs.

SOCONY-VACUUM OIL COMPANY, INC., CONTINENTAL OIL COMPANY, THE PURE OIL COMPANY, SHELL OIL COMPANY, INC., SINCLAIR REFINING COMPANY, MID-CONTINENT PETROLEUM CORPORATION, AND PHILLIPS PETROLEUM COMPANY,

Respondents.

To the Honorable Supreme Court of the United States:

The PETITION of the NORTHWESTERN OIL COMPANY respectfully shows to this Honorable Court as follows:

This is a petition for a writ of certiorari to review a final decision of the Circuit Court of Appeals for the Seventh Circuit, rendered December 7, 1943, 138 F. (2d) 967, affirming a judgment of the District Court for the Western District of Wisconsin, entered May 4, 1943, in favor of Respondents upon a directed verdict, in an action in which Petitioner seeks to recover from Respondents losses it sustained as a jobber in gasoline, from whom Respondents, by means of a conspiracy in violation of the Antitrust Act (Sec. 1, Title 15, U. S. C. A.), exacted large sums of money in unlawfully increased prices of gasoline.

JURISDICTION

Jurisdiction was invoked on the ground that the suit arose under the provisions of the Antitrust Act (The Act of July 2, 1890, c. 674, 26 Stats. 209, U. S. C. A., Title 15, Section 1, known as the SHERMAN ANTITRUST ACT), and The Clayton Act (The Act of October 15, 1914, 38 Stats. 730, Title 15, U. S. C. A., Section 15).

QUESTIONS PRESENTED

1. Where Respondents, by means of a conspiracy in violation of the Antitrust Laws, have raised and fixed the price of gasoline which Petitioner as a jobber was compelled to and did pay, is Petitioner entitled to recover as damages the unlawful excess? The Circuit Court of Appeals held it was not. Petitioner contended that such ruling was error.

   a. Is it a defense to Petitioner's right to recover that in the price it received on the sale of said gasoline at retail said excess in cost was included, where such selling price was also fixed by the conspiracy? The Circuit Court held that it was. Petitioner contends that such ruling was error.

2. The conspiracy having, for a period of two years, increased and fixed jobber's cost of gasoline, and having at the same time increased and fixed his selling price in the same amount, so that the margin between cost and selling price remained fixed, has the jobber been injured so that damages may be recovered under the Clayton Act?

3. Does the decision in the case at bar create a conflict of decisions in the Circuit Court of Appeals in that it is opposed to the decision of the Circuit Court of Appeals of the Second Circuit, in *Straus vs. Victor Talking Machine Co.*, 297 Fed. 791, in which that Court held that plaintiff

there was entitled to recover the difference between the amount he paid for merchandise as raised and fixed by a conspiracy in violation of the Antitrust Act and what he would have paid but for the conspiracy, regardless of whether he recover the excess and made a profit in such sales or not? The District Court in the case at bar held that it did not and the Circuit Court affirmed. Petitioner contends that such ruling was error.

4. Where it is conceded by Respondents that someone is entitled to recover the unlawful excess cost of gasoline caused by the conspiracy, and Respondents have not objected that Petitioner is not the real party in interest as required by Rule 12 (h), Rules of Civil Procedure, has not such objection been waived?

5. The fact of damage having been shown in some amount it was error to have declared as a matter of law that no verdict could be returned in favor of Petitioner.

(NOTE: In any event Petitioner was deprived of the use of the money illegally exacted between the time of its exaction and the time it was recovered, even though, according to Respondents' theory it was recovered.)

STATUTES INVOLVED

The ACT of JULY 2, 1890, c. 674, 26 Stats. 209 (U. S. C. A., Title 15, Section 1), known as the SHERMAN ANTI-TRUST ACT.

The ACT of OCTOBER 15, 1914, 38 Stats. 730 (Title 15, U. S. C. A., Section 15), known as the CLAYTON ACT.[1]

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[1] "A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws *shall be prima facie evidence* against such defendant in any suit or proceeding brought by any other party against such defendant under said laws *as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto;* Provided, This section shall not apply to consent judgments or decrees entered before any testimony has been taken." (Italics supplied.)

STATEMENT

Respondents organized and carried on through 1935 and 1936, a conspiracy in violation of the Antitrust Act by means of which the tank car spot market price of gasoline sold to Petitioner and other jobbers in the Mid-Western area[2] was raised and fixed.

Practically all of the gasoline sold on the spot market is sold by independent refiners to independent jobbers and that constitutes only from 5% to 7% of all gasoline sold in the Mid-Western area. It therefore appears that the price at which the Major Oil Companies sold the greater part of their gasoline in the Mid-Western area was directly controlled by spot market sales by independent refiners of less than 7½% of all the gasoline sold in the ten-state area.

The conspiracy was organized at a series of secret meetings held by Major Oil Company officers, including Respondents, during the first two months of 1935, at which a Committee was appointed to adopt a continuous buying program of distress gasoline[3] from independent refiners at gradually increasing prices which became the prices that jobbers by virtue of their supply contracts were compelled to pay for gasoline.

When the conspiracy went into effect on March 7, 1935, the tank car spot market price to jobbers was .04⅜¢ per gallon (regular grade gasoline). Immediately reacting to the operation of the conspiracy, this price was advanced at

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[2]The Mid-Western area, known in the Oil Industry, is composed of the 10 states of North Dakota, South Dakota, Minnesota, Iowa, Missouri, Kansas, Illinois, Wisconsin, Michigan and Indiana. Over 21% of all gasoline sold in the United States in 1935 was sold in those states amounting to almost 5,000,000,000 gallons, and over 25%, amounting to nearly 5,500,000,000 gallons sold in 1936.

[3]Distress or surplus gasoline was known in the industry as gasoline for which independent refiners could not find buyers at going prices and therefore were selling it on the market for whatever price they could get and below the going market price.

Independent jobbers are those who do not buy gasoline under contracts.

intervals of about two weeks at 1/8¢ to 1/4¢ through 1935 and 1936, so that on June 14, 1935, the price had advanced 1 1/4¢ and continued its said advance through 1936[4] (R. 1065-67; Exhs. 22-23). Never again during 1935 or 1936 did the price return to .043/8¢. The control of the market by the conspiracy left no other proof possible than that the spot market price after March 7th would have been .043/8¢ per gallon as it was then. Petitioner claims damages for the amount over .043/8¢, illegally collected from it.[5]

Petitioner and other jobbers were supplied with gasoline for the most part by Major Oil Companies in tank car lots under contracts which uniformly provided that the base price to be paid by the jobber should be the spot market price published in the trade journals. Respondents sold most of their gasoline in 1935 and 1936 to jobbers (*U. S. vs. Socony-Vacuum*, 84 L. Ed. 1129), and the balance to consumers through their owned or leased service stations. Petitioner's supply was with Tidewater Oil Sales Corporation[6] (R. 236, 242), through Barber Company, its exclusive sales agent, which provided that the base price should be the

[4]There were 7 advances in the prices of both regular and third-grade gasoline during the period from March 7, 1935, when the Mid-Continent program started operation, and June, 1935, when prices finally leveled off. During this period the mechanical subcommittee recommended from 5 to 8 advances in the purchasing prices. The committee, as we have seen, made no further recommendations after June 1, 1936, because, as McDowell, one of the convicted Respondents testified, the contacts had been made and it was one of those things that just carried on. Market prices remained rigid from June through December. (*U. S. vs. Socony-Vacuum*, 84 L. Ed. 1129.)

[5]To illustrate the immediate effect of the conspiracy on the spot market, the following appears in the Record, 1063-67; Exhs. 22-23:

Prices—1935:

2/18 to 3/8.....04375	3/30 04875	5/18 05375
No change.	4/6 05	5/25 055
3/9 045	4/17 05125	6/6 05625
3/13 04625	4/22 0525	6/14 to 12/31...05625
3/18 0475		

[6]The Indictment against Tidewater was dismissed by the trial court on a technical ground. In 1935, Petitioner purchased 6,350,297 gallons of gasoline with which to carry on its business as a jobber, and an amount equal to approximately 2% thereof, which was not resold but used in operating its motor vehicles, and lost through shrinkage, shortages, etc., and in 1936, 7,291,805 gallons; the illegal increase in the price of gasoline caused by the conspiracy resulted in Petitioner's having paid in those two years the sum of $156,308 more than it otherwise would have paid (R. 1301, Exh. 165).

low of tank car spot market prices published in the Chicago Journal of Commerce.

The Respondents, with five other Major Oil Companies, and five of their officials or agents, were indicted and convicted in the District Court of the United States for the Western District of Wisconsin for violating the Antitrust Act, by means of the conspiracy, as stated above (*U. S. vs. Socony-Vacuum Oil Co., et al.*, 23 F. Supp. 937). This judgment of conviction was affirmed by this Court May 6, 1940 (*U. S. vs. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 84 L. Ed. 1129).[7] The present action was commenced November 8, 1940. As a complete, detailed statement of the facts relative to the organization of the conspiracy and its operation appears in the opinion of this Court in *U. S. vs. Socony-Vacuum*, and also appears in the opinion of the Circuit Court of Appeals, 105 F. (2d) 899, on appeal by defendants, further detailed statement of the facts in that regard is omitted here.

No testimony was offered to oppose or overcome the *prima facie* case established by the Clayton Act, *supra*. Likewise, it was established without dispute upon the trial that Peti-

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[7]The Indictment charged:

"Beginning in the month of February, 1935, and continuing to the date of the presentation of this indictment, defendants and certain persons hereinafter referred to, and other persons to the grand jurors unknown, well knowing all the foregoing facts, have combined and conspired together for the purpose of artificially raising and fixing the tank car prices of gasoline in the aforementioned spot markets, and, as intended by them, defendants have artificially raised and fixed said spot market tank car prices of gasoline and have maintained said prices at artificially high and non-competitive levels, and at levels agreed upon among them, and have thereby intentionally increased and fixed the tank car prices of gasoline contracted to be sold and sold in Interstate Commerce as aforesaid in the Mid-Western area (including the Western District of Wisconsin), and have arbitrarily, by reason of the provisions of the prevailing form of jobber contracts above described in paragraph 11, exacted large sums of money from thousands of jobbers with whom they have had such contracts in said Mid-Western area (including the Western District of Wisconsin), and in turn have intentionally raised the general level of retail prices prevailing in said Mid-Western area (including the Western District of Wisconsin). In so doing, defendants have then and there engaged in an unlawful combination and conspiracy in restraint of trade and commerce in gasoline among the several states of the United States in violation of Section 1 of the Act of Congress of July 2, 1890, known as the Sherman Antitrust Act."

tioner purchased at the unlawful price, during 1935 and 1936, 13,642,102 gallons of gasoline and paid therefor $156,308, after giving credit for all price deductions granted by its supplier, more than it would have paid but for the conspiracy. Petitioner contends that the transaction between Petitioner and defendants—the conspirators, ended there, it was completed and a cause of action then and there arose against Respondents for having illegally, through violation of the Antitrust Act, exacted 1¼¢ to 1½¢ per gallon from Petitioner on the quantity purchased, regardless of anything that occurred thereafter. Petitioner purchased gasoline in 10 or 20 tank car lots, each containing about 8,000 gallons. The movement of the cars was not continuous from the Major Company to the jobber and from the jobber to its customer, on the contrary, the gasoline was transferred to the jobber's bulk storage plants and at a later time shipped to filling stations in tanks and trucks and there sold at the posted service station price of the market leader (Standard of Indiana); about 2% of the gasoline purchased was used in its own motor truck operations by Petitioner.

The Circuit Court of Appeals, erroneously affirming the District Court, held that all future transactions by Petitioner in the sale or other disposition of the gasoline on which the excess, illegal price was paid, should be probed to determine whether or not some or all of the loss was at some later, unknown time, recovered by Petitioner in its bargaining for the sale of the commodity at retail with an independent third party.

REASONS FOR GRANTING THE WRIT

The Circuit Court of Appeals erred:

1. In sustaining the ruling of the trial court that Petitioner could not recover any part of the illegal excess cost of gasoline exacted through a conspiracy in violation of the Antitrust Act, unless it first proved that such excess was not recovered by it in subsequent sales thereof.

2. In holding that proof that Respondents by means of a conspiracy in violation of the Antitrust Act compelled Petitioner to pay a price for gasoline which the conspiracy had raised and fixed had caused Petitioner no damage.

3. In holding that Petitioner was not damaged in its business or property through a conspiracy in violation of the Antitrust Act which fixed and maintained the margin between its buying cost and selling price of gasoline. The margin so fixed being at such an amount as left no operating profit.[8] The evidence shows that the tank car market before the conspiracy was a free and competitive market, for the spot market price required by contract to be paid by the jobber was determined by the price paid in spot sales from day to day by independent jobbers to independent refiners. The tank wagon (jobber's selling price) market was also free and competitive before the conspiracy; during the conspiracy both markets were fixed and controlled by the conspiracy.

4. In sustaining trial court's decision that the rule as to damages applied in *Straus vs. Victor Talking Machine Co.*, 297 Fed. 791, was not applicable.

5. In directing a verdict for Respondents and entering

[8]Petitioner, for more than 20 years, has been engaged in the business of buying, selling and distributing petroleum products in Northern Wisconsin and Minnesota; in 1935 and 1936 it owned and maintained about 30 bulk storage plants and a large fleet of tank trucks and other motor vehicles. It had an investment of about one million dollars in the business.

judgment thereon on ground that Petitioner sustained no damage.

6. In holding that:

> "The essence of the charge was illegal fixing of increased retail prices of gasoline by defendants by raising tank car prices and thereby, in turn, eventually, retail prices. Upon that conviction plaintiff relied as a basis for recovery in this cause."
>
> 138 F. (2d) 970.

7. In holding that the consumer and not Petitioner was the real party in interest, although Respondents effectively waived that defense.

8. The decision of the Circuit Court of Appeals in the case at bar creates a conflict of decisions in the Federal Court in that it is opposed to the decision of the Circuit Court of Appeals for the Second Circuit rendered February 4, 1924, in the action of *Straus vs. Victor Talking Machine Co.*, reported in 297 Fed. 791, and of the District Court of the Southern District of New York.

9. The Circuit Court erroneously affirmed the erroneous ruling of the District Court in the case at bar:

> "That the allegation by plaintiff that he paid a higher purchase price as a result of an illegal conspiracy, without an allegation that its selling price was not increased, is insufficient to state a claim which entitled it to relief.
>
> "The burden is on the jobber to allege and prove the facts with respect to its selling price as well as its buying price,"

such ruling having been made by the same District Court in *Leonard vs. Socony-Vacuum Oil Co., Inc.*, 42 F. Supp. 369, and applied to the case at bar. No authority in support of this decision is cited, none exists.[9]

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[9]The court said that the Interstate Commerce Act cases were inapplicable because that Statute (49 U. S. C. A., Sec. 1, *et seq.*) was

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court, on a day certain to be therein designated a full and complete transcript of the record and all proceedings of said Court of Appeals in this case, which was entitled in that Court "*Northwestern Oil Company, Plaintiff-Appellant, vs. Socony-Vacuum Oil Company, Inc., et al., Defendants-Appellees.*" to the end that said cause may be reviewed and determined by this Court as provided by law, and that your Petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate; and that the said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court.

NORTHWESTERN OIL COMPANY,
By J. E. SMITH, *Treasurer*,
Petitioner.

W. P. CRAWFORD,
Attorney for Petitioner.

"a fundamentally different enactment from the Clayton Antitrust Act. 38 Stats. 730. The Interstate Commerce Act insures recovery for departure from the published tariffs. In those cases the illegal, unreasonable, excess charge is definitely and specifically found by the Commission in its order, and its repayment to the one who has suffered the loss by such overpayment is fixed," (*Leonard vs. Socony-Vacuum Oil Co.*, 42 F. Supp. 369), but as to damages the Interstate Commerce Act does not:

"*insure* a recovery for departure from the published tariffs."

The Interstate Commerce Act, 49 U. S. C. A., Sec. 1 (5), provides that all transportation charges

"shall be just and reasonable and every unjust and unreasonable charge for such service, or any part thereof is prohibited and declared to be *unlawful*,"

and the Interstate Commerce Act, Sec. 8, provides that:

"such common carrier shall be liable to the person or persons injured thereby for the *full amount of damages* sustained in consequence of any such violation of the provisions of this chapter,"

and the Antitrust Act provides:

"Any person who shall be injured in his business or property may sue and recover *three*-fold the damages sustained."

STATE OF WISCONSIN,

ss.

COUNTY OF DOUGLAS.

J. E. SMITH, being first duly sworn, on oath says that he is an officer, to-wit: Treasurer of the Northwestern Oil Company, Petitioner above named; that he has read the above and foregoing Petition and the facts therein stated are true as he believes.

J. E. SMITH.

Subscribed and sworn to before me this 14th day of February, 1944.

FLORENCE STAUPE,
Notary Public,
Douglas County, Wis.

My commission expires July 14, 1946.

STATE OF WISCONSIN,

ss.

COUNTY OF DOUGLAS.

W. P. CRAWFORD, being first duly sworn, on oath says that he is the attorney for Northwestern Oil Company, Petitioner above named; that he has read the foregoing Petition, and that the facts therein stated are true as he believes.

W. P. CRAWFORD.

Subscribed and sworn to before me this 14th day of Febru ary, 1944.

FLORENCE STAUPE,
Notary Public,
Douglas County, Wis.

My commission expires July 14, 1946.

BRIEF OF ARGUMENT

I.

This case presents questions of importance in the general administration and enforcement of the Clayton Act provision of the Antitrust laws, which have not as yet been decided by this Court. In *United States vs. Socony-Vacuum Oil Co., Inc., et al.*, 310 U. S. 150, 84 L. Ed. 1129, this Court affirmed the conviction of Respondents for having raised and fixed prices of gasoline paid by jobbers by means of a conspiracy in violation of the Antitrust Act. Petitioner and other jobbers in the Mid-Western area sustained damage by reason of having been compelled to pay such illegally increased prices for gasoline; but the Circuit Court of Appeals in the case at bar, affirming a decision of the District Court, held that no damage was caused Petitioner by said conspiracy.

Petitioner contends that such decision is erroneous. The statute of limitations will have run against a large number of claims by jobbers before any other case than this can be presented to this Court for decision, even though an Act of Congress, passed October 10, 1942, suspends the statute of limitations in this class of cases to June 30, 1945, unless an earlier date is fixed by law. The Circuit Court of Appeals for the Second Circuit has held in *Straus vs. Victor Talking Machine Co.*, 297 Fed. 791, in a case not distinguishable from the case at bar, that where a dealer in merchandise has paid therefor a price which was increased by force of a conspiracy, he is entitled to recover the difference between the price paid and the price that would have been paid but for the conspiracy, regardless of whether such increase was passed on or recovered back by the dealer in his sales to his customers.

The decision of the Circuit Court of Appeals in the case

at bar is in direct conflict with the Circuit Court of Appeals for the Second Circuit in the Straus case.

II.

Petitioner was not obliged under its contract with its supplier to sell the gasoline at any particular price or time or to sell it at all. When it bought this gasoline it became the owner thereof with the right to dispose of it as it might choose. The conspiracy deprived Petitioner of the right to buy or sell gasoline except at prices fixed by the conspiracy. Gasoline was bought by Petitioner at intervals of 10 to 30 days on orders of 10 to 30 cars each, each car holding about 8,000 gallons. When, on any of these purchases, there was illegally exacted, through a violation of the Antitrust Act, an increase in the price, Petitioner then and there had a cause of action to recover back such increase. It might sue therefor the next day or at any time later, within the statute of limitations.

Petitioner contends that when he did sue he was entitled to recover back the illegal excess paid. Upon what theory it can be held that the jobber was obliged to sell gasoline on which he paid the illegal price and account to Respondents for what he received therefor is difficult to understand. Reference by the Circuit Court to the fact that the jobber is a middleman does not affect his right to the protection of the Antitrust Act whose violation exacts an unlawful price from him; he was not selling gasoline on commission; in fact, about 2% of this gas was not sold but used in Petitioner's own motor vehicles.

In the class of cases under the Interstate Commerce Act, in which a carrier illegaly exacted from the shipper a freight rate higher than that fixed by the Interstate Commerce Commission and where the shipper received back such illegal amount by adding it to the price he received from his

customers to whom he disposed of the commodity, this Court held that the shipper was entitled to recover from the carrier the excess even though such illegal excess was passed on to its purchasers.

Southern Pacific vs. Darnell-Taenzer Co., 245 U. S. 531, 533;[10]

Adams vs. Mills, 286 U. S. 397, 76 L. Ed. 1184;[11]

Chattanooga Foundry & Pipe Works vs. City of Atlanta, 203 U. S. 390;

N. Y., N. H. & H. R. Co. vs. Ballou & Wright, 242 F. 862.

The Circuit Court erroneously held such cases inapplicable here.

Respondents claim that the consumer paid the loss and that he alone may recover but the consumer was not in relation or privity with the conspiracy or the conspirators, the jobber was, as it was from the jobber that Respondents took

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[10]"The general tendency of the law, in regard to damages, at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. * * *

"The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. *New York, New Haven & Hartford R. R. Co. vs. Ballou & Wright*, 242 Fed. Rep. 862. Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result. 13 I. C. C. 680. Probably in the end the public pays the damages in most cases of compensated torts."

[11]"Neither the fact of subsequent reimbursement by the plaintiffs from funds of the shippers, nor the disposition which may hereafter be made of the damages recovered, is of any concern to the wrongdoers. This proceeding does not involve a controversy between the consignors and the consignees; and the carriers cannot be allowed to import one into it. * * *

"The plaintiffs have suffered injury within the meaning of Section 8 of the Interstate Commerce Act; and the purpose of that section would be defeated if the tortfeasors were permitted to escape reparation by a plea that the ultimate incidence of the injury was not upon those who were compelled in the first instance to pay the unlawful charge. * * *

"In contemplation of law the claim for damages arose at the time the extra charge was paid."

This principle would restore to Petitioner the money wrongfully taken from it. But Respondents so-called principle of the Criminal Case that the jobber passed on the illegal price, which it contends allows it to retain its illegal profit because everyone knows that the consumer cannot recover.

the money. Petitioner was in privity with the conspiracy in buying his gasoline at conspiracy prices. The right of the consumer, consisting in the case at bar of many millions of car owners having small claims of a few cents to a few dollars each, to pursue the tortuous course of litigation resulting from each of such transactions, would be a barren one.

In the decision of the Circuit Court of Appeals, it is said that the case at bar is more nearly within the decisions under the Interstate Commerce Act, such as *Pennsylvania R. R. Co. vs. International Coal Mining Co.*, 230 U. S. 184, and *Davis vs. Portland Seed Company*, 264 U. S. 403, which were actions to recover damages for illegal discrimination in rates where the only proof made was that the plaintiffs paid only the legal rate while another shipper paid less than the legal rate and the plaintiffs claimed as damages, the difference between the legal rate which they paid and the undercharged rate paid by this competitor. Unlike the case at bar, no money was there illegally taken from the shipper; but, Petitioner contends that under the other section of the Interstate Commerce Act considered in cases such as *Southern Pacific vs. Darnell, supra*,[12] where the plaintiff paid an illegal rate exacted of it by the carrier, this Court held that the amount of such illegal exaction was the pecuniary loss and damage of the shipper; the amount necessary to compensate plaintiff for the violation of its legal rights.

The Circuit Court of Appeals said that the Interstate Commerce Act, 49 U. S. C. A., Section 1, insures the shipper a recovery of the illegal excess as an overcharge, while under the Clayton Act damages are recoverable for a tort.

The right to recover for the illegal exaction of freight

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[12]In the Darnell Case this Court said:

"Certainly these defendants are not entitled to this money, which they have taken from the complainants, and

"Carriers cannot be heard to say that reparation for the exaction of unreasonable freight rates should be denied because the shipper or consignee from whom the same has been collected has on that account secured a higher price for the commodity from his purchaser."

rates under the Interstate Commerce Act is based upon the statute which says that it is *unlawful* for a carrier to collect higher than the established Interstate Commerce Commission rate, therefore that action is one in tort like the Clayton Act is. This Court, in *Adams vs. Mills, supra*, designates the carrier exacting an illegal charge as a *tortfeasor*. It there said:

> "The plaintiffs have suffered injury within the meaning of Section 8 of the Interstate Commerce Act; and the purpose of that section would be defeated if the *tortfeasors* were permitted to escape reparation by a plea that the ultimate incidence of the injury was not upon those who were compelled in the first instance to pay the unlawful charge."

In *Chattanooga Foundry & Pipe Works vs. City of Atlanta*, 203 U. S. 390, Mr. Justice Holmes, writing the opinion of the Court says, regarding damages under the Clayton Act:

> "'*A person whose property is diminished by a payment of money wrongfully induced is injured in his property.*'
>
> * * * * * * * * *
>
> "'*But when a man is made poorer by an extravagant bill we do not regard his wealth as a unity, or the tort, if there is one, as directed against that unity as an object. We do not go behind the person of the sufferer. We say that he has been defrauded or subjected to duress, or whatever it may be, and stop there.*'"[13]

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[13]This Court, in every case where it found that one has illegally by whatever fraud or other violation of law taken the money of another, has ordered the wrongdoer to make restitution by giving the money back to the one from whom it was taken; in the language of Mr. Justice Holmes in the Chattanooga Case,

> "'We do not go behind the person of the sufferer. We say that he has been defrauded or subjected to duress or whatever it may be and stop there.'"

The Circuit Court erred in failing to give any effect to this principle.

Was Petitioner the sufferer here? Its money was by duress, fraud and violation of the Antitrust law, taken from it, $12,000 (an illegal increase of 1½c per gallon) on every order of 10 cars of gasoline. Was Petitioner injured thereby? The remedy offered by Respondents was that Petitioner was at liberty to sell and recoup his losses. Petitioner then no longer was operating its capital and its organization to make a profit but only to recover its loss, and to this Respondents reply, it is true we have illegally taken and kept his money, but he has not been injured or damaged in his business or property.

The Circuit Court erroneously[14] construed the indictment in the criminal case as follows:

> "The essence of the charge was illegal fixing of increased retail prices of gasoline by defendants by raising tank car prices and thereby in turn eventually retail prices. Upon that conviction plaintiff relied as a basis for recovery in this cause."

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[14]Similarly the Circuit Court erroneously held that the following cases are authority for its ruling that Petitioner may not recover the increased cost of gasoline paid because it was passed on to the ultimate consumer:

Weeks vs. Bareco Oil Co., 125 F. (2d) 84;
Twin Ports Oil Co. vs. Pure Oil Co., 119 F. (2d) 747;
Leonard vs. Socony-Vacuum Oil Co., 42 F. Supp. 369;
Farmers Co-op. Oil Co. vs. Socony-Vacuum, 133 F. (2d) 101;
Miller Oil Co. vs. Socony-Vacuum, 37 F. Supp. 831.

The *Weeks Case* was one in which Weeks and one other jobber on their own behalf and as representatives of a class of approximately 900 Illinois jobbers sued for damages resulting from the conspiracy of respondents in raising and fixing jobbers' prices of gasoline; the trial court dismissed the action upon the ground that the plaintiffs were too few in number to constitute adequate representation of the 900. The question of whether or not recovery could be had by the jobber who paid the excess price and had passed it on to the consumer was not raised, discussed or decided. Therefore, that decision is no authority to sustain the Circuit Court of Appeals in the case at bar.

The *Twin Ports Oil Case* is one in which plaintiff there sued to recover a loss of margin resulting from the same conspiracy. The case was tried on a stipulation of the parties that as to damage the question of whether plaintiff's margins had been lessened because of the conspiracy was the only question involved; plaintiff's proof showed that there was no loss of margins but on the contrary plaintiff's margins between its cost and selling price remained the same during the period claimed. The decision of the trial court and the Circuit Court was against the plaintiff. Respondents, after the stipulation, contended all the way through, even in this court, opposing Twin Ports Petition for Certiorari, that lessened margins was the only question involved. Anything more than that was said by the Circuit Court for the 8th Circuit, was *pure dictum*. That case is no authority to sustain the judgment of the Circuit Court in the case at bar.

The *Leonard Case* was a decision by the District Court who applied the same ruling to the case at bar and is one of the errors sought to be reviewed here.

The *Farmers Co-op. Oil Company Case* was one in which plaintiff sought to recover damages claimed under the same conspiracy on behalf of itself and its stockholders. The trial court dismissed the action, holding that plaintiff was not the real party in interest and because the damages of the plaintiff and of its stockholders are different.

The *Miller Oil Company Case* was one in which the Miller Oil Company sought to recover damages on the same conspiracy because it paid excess prices, merely alleging that it purchased gasoline at such high prices and was damaged in the sum of $60,000.00, without alleging anything more. The decision of the Circuit Court merely ordered the action dismissed unless the complaint was amended within 10 days. This is no authority for the decision of the Circuit Court in the case at bar.

None of the above mentioned cases deny recovery where an increased price of a commodity is paid by reason of the violation of the Antitrust Act without proving anything more and none of them are in conflict with the decision in the Straus Case.

This is contrary to what the essence of the charge in the indictment was as construed in the criminal case by the Government, by the District Court, by the Circuit Court of Appeals and by this Court. They all held that the essence of the charge in the indictment was the raising and fixing of the tank car spot market prices of gasoline to jobbers, which in turn raised the retail price; this Court held that the charge in the indictment was that the defendants

> "have artificially raised and fixed said spot market tank car prices of gasoline and have maintained said prices at artificially high and non-competitive levels and at levels agreed upon among them and have, thereby intentionally increased and fixed the tank car prices of gasoline contracted to be sold in interstate commerce as aforesaid in the Mid-Western area."

Petitioner Sustained Injury and Damage Under the Clayton Act Because Its Margin Between Its Buying and Selling Price Was Fixed by the Conspiracy, and the Circuit Court Erred in Directing a Verdict for the Respondents.

Based on the evidence, chiefly documentary and not possible of dispute, Respondents, established the fact in the case at bar that Petitioner sustained damages through having his buying and selling price—his margins—fixed by the conspiracy. Respondents claimed upon the trial, and stated in their Brief, page 43, in the Circuit Court of Appeals, in the case at bar, that:

> "In the Madison Oil Case, upon which plaintiff bases this case, the defendants were charged with and convicted of raising the tank car and in turn the retail prices of gasoline. *Thus, under the theory of that case, both plaintiff's buying and selling prices were raised as a result of this conspiracy.*"

That Petitioner was injured and damaged by the conspiracy was therefore shown by Respondents themselves.

The force and effect of this position is that Respondents,

by the conspiracy fixed and maintained for a period of two years the margin of 2¢ or less per gallon, upon which the jobber could do business. This eliminated all competition and freedom of enterprise. Thus, Petitioner sustained injury and damage under the Clayton Act, and the ruling of the Circuit Court to the contrary was error.

Petitioner was denied any opportunity to make a profit in its business. Petitioner could neither buy nor sell on the basis of bargaining, economic conditions, supply and demand, business improvement; large volume of its business, prompt payment of bills, all were taken away by the conspiracy.

Before the conspiracy, the tank wagon market (jobber's selling market) was free, although jobbers selling through service stations to the public were obliged to follow the posted Standard of Indiana prices, they could not sell higher and have any buyers; the Standard price was based upon competition between that and other Major Companies. As contended by Respondents and as stated by this Court, as well as the Court of Appeals in *U. S. vs. Socony-Vacuum*, the tank wagon (jobber's selling price) was also controlled and fixed by the conspiracy. The evidence shows (R. 1268-1269; Exh. 154) that on September 11, 1934, the tank wagon price (Standard of Indiana's posted service station price) dropped 2.2¢ per gallon, cutting the jobber's margin from .03773¢ to .01573¢ per gallon.[15] There was no corresponding decline in the tank car price. A slight increase in the jobber's margins occurred in December, 1934, bringing it to .02198¢; in March, when the buying program went into

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[15]The Circuit Court of Appeals in *U. S. vs. Socony-Vacuum*, 105 F. (2d) 809, at 835, very properly said:

"The question becomes one as to whether the Standard was a partner in the alleged conspiracy or an adversary engaged in competition. Thus, an important legal question is presented.

"Under the circumstances, however, we need not determine either our authority or the merits of the question for the reason that it has become moot because the case must be reversed upon other grounds."

effect and the two markets became fixed, the margin was set at a fraction below 2¢; however, on June 14th the tank car and tank wagon market became rigid and remained at .02007¢ through the remainder of 1935.

A table of margins during 1935 and 1936 is set out in an Appendix hereto.

The average daily Tank Wagon Jobber's Margin for 1934 was .03171¢

The average daily Tank Wagon Jobber's Margin for 1935 was .02010¢

The average daily Tank Wagon Jobber's Margin for 1936 was .02066¢

Whether the Standard was a partner in the conspiracy or not, Respondents took advantage of and used the Standard's formula for determining its posted tank wagon (retail) price and fixed the tank car (buying) price to conform to the Standard's posted service station price in such a way that the jobber's margin became fixed as it was, as shown in the Appendix.

It appears from the evidence that Petitioner's contract contained a "stop loss" provision (R. 339) to the effect that when the difference between its cost and selling price was less than 5½¢, which means 2¢ to the jobber (3½¢ going to the service station operator), its supplier, recognizing that he was then operating at a loss, would reduce its cost price by the amount that Petitioner's margin was less than 2¢. Respondents now claim that by the conspiracy Respondents intended to and did keep the jobber's margin at 2¢ or less; this as Respondents have shown was accomplished by fixing the jobber's cost and at the same time fixing his selling price. Thus the difference between the jobber's buying and selling price was frozen so that no matter how high the selling price went his buying price went equally high, and therefore as seen by the schedule of prices (R. 1063, Exh. 22), the jobber

was operating at a loss when the conspiracy started operating. In March, 1935, the jobber's margin was .02073¢, and dropped below that to .01782¢ in April, and was .02007¢ on June 14th, remaining at that figure without change until 1936; his margin never increased above that figure during the balance of the year 1935, except with unimportant intervals, nor during 1936, when for most of the time it was less than .02007¢.

Respondents cannot complain that this theory is not now more specifically set out in the pleadings nor insisted upon in the trial. Respondents in opposing Petitioner's claim of damages that it was entitled to recover the amount by which its price had been raised by the conspiracy, assembled the evidence in the record and applying thereto what was said by this Court in the criminal case, *United States vs. Socony-Vacuum Oil Co., Inc., et al., supra*, that both Petitioner's buying and selling prices were raised and fixed by the conspiracy at the same time and amount, therefore Respondents have established the fact of damage to Petitioner leaving only the extent of damage to the jury. The District and Circuit Courts were in error in failing to recognize and give effect to that.

A minor or subsidiary question that Petitioner was *in pari delicto* with the Respondents is referred to by the Circuit Court of Appeals to the effect that the District Court would have been justified in directing a verdict upon that ground.

The District Court indicated that they found it unnecessary to decide that question but did intimate that there was no proof of *pari delicto*. This question not having been decided below doubtless it is not for decision here, since the judgment complained of was rendered on a different ground. This is not the time or place to present analysis, the evidence and applicable decisions.

McDowell, Vice-President of Mid-Continent, testified that

price wars always exist in the industry (R. 181). By December, 1934, price wars had been discontinued.

Podvin's activities with respect to restoring normal prices and eliminating price wars were confined to his own local market area.

Neither the Department of Justice nor any other governmental agency regarded his efforts to suppress price wars in the oil industry, even by concerted action, as a violation of the Sherman Act. In fact, the Government directed Arnott by its Petroleum Administrator Ickes in a letter dated July 20, 1934, to take necessary steps to eliminate price wars. It was only after they were eliminated in December, 1934, and the Respondents stepped outside of that field and in February, 1935, perfected a conspiracy among themselves to buy up surplus gasoline and raise prices that the Government stepped in, resulting in the conviction of Respondents for violating the Sherman Act.

To agree with Respondents' contention regarding *pari delicto* of Petitioner it would have to be concluded that Petitioner knowingly participated in an unlawful scheme which raised its cost of gasoline by $156,308, which it never could recover.

Podvin's activities with reference to restoring prices in areas where price wars existed, were discontinued upon becoming suspicious that Respondents were rigging the market. The conspiracy was not organized until February, 1935.

If it be said that Podvin took part in the conspiracy which raised prices, he did so innocently. He testified (R. 576) that he never heard of the conspiracy until he read of the indictment which was returned in December of 1936.

This Court in *United States vs. Socony-Vacuum Oil Co., Inc., supra,* said:

> *"Market manipulators commonly obtain assistance from the activities of the innocent as well as from those of their allies. The fact that they may capitalize on the*

purchases of others is no more significant than the fact that they may gain direct or collateral benefits from market trends, bullish factors or fortuitous circumstances."

The Decision Sought to Be Reviewed Here Creates a Conflict of Decisions of the Federal Courts in That It Is Opposed to the Decision of the Circuit Court of Appeals of the 2nd Circuit in the Case of Straus vs. Victor Talking Machine Company, 297 Fed. 791.

The Straus case, as reported at page 800, contains a table showing the prices paid by Macy's for Victor goods to be more than the wholesale listed price to distributors. Thus, it shows that Macy's were not paying the full retail prices but by maneuvering around were able to buy Victor goods for less but receiving the retail price on its sales, thus "passing on" and recovering back all of the excess paid and a profit besides. Likewise, a passing on to the jobber's purchasers of the increase in his buying price was held immaterial on the question of damages. So that it cannot be doubted that there is a conflict between the decision in the Straus case in the Second Circuit and that in the case at bar in the Seventh Circuit. We see in the record in the Circuit Court of Appeals in the Straus case, tried in the District Court before Judge Mack, Vol. VII, page 3994, that Judge Mack said to defendants' attorneys:

"Now, let us see. Suppose you should attempt to argue to the jury that it appears from the evidence that Macy's despite the fact that they had to pay more than other dealers, nevertheless made a profit on this business, and that therefore they cannot come in here and say that they were injured. I could not permit you to argue that to the jury. I would have to stop you, if you began to argue that because you would be arguing an immaterial thing, and I should have to tell the jury that it was utterly immaterial whether Macy's made a profit or not,"

and that the Court instructed the jury, as shown by the file in Vol. VIII, page 4600, as follows:

"I have not allowed any evidence to go in before you bearing on the question of profits or no profits that Macy may have gotten, or on the relative profits that they made before or after 1914, or a good many other questions which were attempted to be brought forward in connection with the question of damages. I have not allowed that because, in my judgment, it was not within the legal rules, and therefore, *whether they were right or wrong was immaterial*—and the same way with some of the points in that connection, that the defendants desired to bring forward: In my judgment they were not within the legal rules, and therefore they were entirely withdrawn from your consideration. I point this out because of the vast difference in what is ultimately claimed and what was originally claimed. I point it out, too, because the question that you will have, in so far as damages are concerned, is limited to the difference between what you believe from the evidence *Macy's actually paid for Victor goods during the periods in question, and what they would have paid for Victor goods if it had not been that this combination was in existence.*"

* * * * * * * *

"I have stated to you, gentlemen, as to whichever or both that you find the illegal combination existed or continued to exist, I have stated to you that the measure of damages is the difference between what Macy's actually had to pay out, *reasonably in the conduct of their business, and what they would have had to pay out for the same goods if they could have gotten the same goods under a regime of free competition.*"

* * * * * * * *

"I intended to say to you and overlooked it, that it is utterly immaterial whether or not Macy's were in the combination prior to May 1st, 1914. If they were in the combination or if they were not in the combination does not make a particle of difference; they had a right to get out, if they were in; they had a right to stay out if they were not in. Their right, if they had one, is based upon their not being in the combination during the period in question, and upon the alleged damage suffered

by reason of the combination, if these things are proven, *it is utterly immaterial whether or not, at one time, they were in it, or whether or not they are today in any illegal combination similar to this; it has nothing whatsoever to do with their right to recover in this case.*"

And again, Judge Mack said (Vol. XIV, pages 6432-3), in sustaining objections by plaintiff to defendants' questions to witnesses:

"Q. What was the total price realized by Macy's on the sale of those items, the total of which amounts to $278,733.53?

The Court: Objection sustained.

Mr. Griffin: Exception. May I inquire, your Honor, if that is on the ground that it is not proper cross examination, or does your Honor's ruling go further than that?

The Court: It goes further; it is on the ground that it is immaterial also. * * * I have come to a pretty clear conclusion on the legal rule in that respect, and I can not see how the question of possible profits or possible losses can affect the measure of damages on the actual purchase price."

And again (in Vol. XIV, pages 6437-8):

"That defendants' offer to prove by exhibits and testimony of witnesses that during the conspiracy period Macy, instead of having been damaged and caused a loss, actually made a profit of about $96,000 by purchasing below retail prices and selling largely at cut prices, increasing his volume of business,"

was denied by the Court.

The Circuit Court, affirming the judgment, said:

"Whether, then, plaintiffs sold to their customers at a profit or loss becomes immaterial in this case. They were entitled to goods at the reasonable price thereof. Through no legal fault of theirs, but because of defendants' wrong, they were deprived of their right, and the jury could find that such deprivation defined in money was the difference between the established reasonable price and the amounts plaintiffs were compelled to pay,

> provided as the trial judge charged, 'they acted reasonably in making these payments.' "

But the trial court in the case at bar, discussing the Straus case in *Leonard vs. Socony-Vacuum Oil Co., et al.*, 42 F. Supp. 369, said:

> "In the case of *Straus, et al., vs. Victor Talking Machine Co.*, 297 F. 791, the plaintiff was forced as a result of the alleged combination to buy his merchandise at retail prices, while his competitors were permitted to buy the same kind at wholesale prices. The plaintiff could not pass on this increase in price as he was required to sell at retail prices. He clearly sustained an actual pecuniary loss."

And, therefore, held that the Straus case was not applicable in the case at bar. Such interpretation of the Straus decision by the District Court in the case at bar would have Straus (Macy's Department Store in New York) continuously during a period of three years, 1914-1917, purchasing Victor goods at retail to the amount of $278,689.77, and selling the same goods at retail to the amount of $278,689.77.

Straus (Macy's Department Store) sued Victor and its distributors, as members of the conspiracy that fixed prices, to recover the difference between what he paid for merchandise because of the conspiracy and what he would have paid except for the conspiracy, he claimed nothing more on any other account; it was proven beyond dispute that the difference between what was paid and what would have been paid except for the conspiracy was $47,835.69 and judgment for that amount was rendered against the conspirators in the District Court and affirmed by the Circuit Court of Appeals. How, as the District Court in the case at bar construed that decision, could Straus have bought merchandise at retail and sell it at retail and have judgment in the District Court, affirmed in the Circuit Court of Appeals, for $47,000 as the difference between the two prices? But the facts in the

Straus case were, as the report of the decision of the Circuit Court of Appeals show, that while Victor's conspiracy intended thereby to compel Straus either to join the conspiracy which fixed prices or pay retail prices for Victor goods, Straus maneuvered around and purchased from distributors for much less than retail and made a profit of over $97,000 by selling at retail and cutting prices.

In the case at bar, McDowell, Vice-President of Mid-Continent Petroleum Corporation, one of the convicted Respondents, testified, that every increase in the tank car market was an immediate loss to the jobber in reducing his margin by that amount; he also testified that his Company (the smallest in the group) profited by the conspiracy from $1,000,000 to $2,000,000 each year during the conspiracy.

CONCLUSION

It is respectfully submitted that this Petition for a writ of certiorari should be granted.

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